

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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|-----------------------------|---|-------------------------------|
| JAMES TROY WALKER, |) | |
| |) | |
| Plaintiff(s), |) | No. C07-3100 BZ |
| |) | |
| v. |) | ORDERING GRANTING |
| |) | DEFENDANT'S MOTION FOR |
| PACIFIC MARITIME ASSOC., et |) | SUMMARY JUDGMENT |
| al., |) | |
| |) | |
| Defendant(s). |) | |
| _____ |) | |

On June 13, 2007, plaintiff James Troy Walker ("plaintiff"), acting *pro se*, filed a complaint against C&H Sugar Co., Inc. ("defendant"), and other defendants alleging employment discrimination under Title VII of the Civil Rights Act. After I granted various motions to dismiss based, in part, on the untimeliness of plaintiff's claims, I permitted plaintiff to amend his complaint against defendant C&H to invoke the doctrine of equitable tolling on the grounds that he "lost legal competency for several years." (See Doc. No. 45.)

Defendant has moved for summary judgment on the ground that plaintiff's claim is barred by the applicable three year

1 statute of limitations under 46 U.S.C. § 763(a), recently re-
2 codified at 46 U.S.C. § 30106.¹ More specifically, defendant
3 argues that no exceptional circumstances exist that would
4 support equitable tolling of the applicable three-year statute
5 of limitations.

6 Plaintiff's opposition to defendant's motion was due on
7 April 1, 2009. As required by Rand v. Rowland, 154 F.3d 952,
8 963 (9th Cir. 1998), plaintiff has been cautioned about the
9 importance of submitting evidence in opposition to a motion
10 for summary judgment to show that there is a genuine issue of
11 material fact for trial, and was advised that if summary
12 judgment is granted, the case would be dismissed and there
13 would be no trial. (See Doc. No. 89.) No opposition was
14 filed; however, as plaintiff is *pro se*, the Court has reviewed
15 the record in deciding defendant's motion.²

16 Viewing the record in the light most favorable to
17 plaintiff and drawing all reasonable inferences therefrom, the
18 factual background to this case is as follows:

19 On May 1, 2002, plaintiff, as an employee of former
20 defendant Marine Terminals Corporation ("MTC"), was scraping
21 raw sugar off of the hull of a ship at the C&H Sugar refinery.
22 Plaintiff was injured when a backhoe, operated by another
23 employee of MTC, malfunctioned and collided with a piece of
24

25 ¹ All parties have consented to my jurisdiction for all
26 proceedings including entry of final judgment, pursuant to 28
U.S.C. § 636(c).

27 ² For the purposes of this review, I have assumed that
28 the various documents in the file were properly before the
Court. See Orr v. Bank of Am., 285 F.3d 764 (9th Cir. 2002).

1 metal, causing the piece of metal to strike plaintiff in the
2 face.³ The backhoe was owned by defendant C&H.

3 The incident resulted in substantial and chronic brain
4 damage to plaintiff, who has continued to suffer from physical
5 and mental symptoms such as severe headaches, dizziness,
6 ataxia, and memory problems. Plaintiff testified in his
7 deposition that he was never declared legally incompetent by
8 any court and that none of his doctors ever recommended that
9 he be confined to a mental institution.

10 Two weeks after plaintiff's accident, he retained an
11 attorney, Cory Birnberg ("Birnberg"), to represent him in a
12 claim for Longshoreman and Harbor Workers Compensation Act
13 benefits. Plaintiff also filed a union grievance regarding
14 the backhoe operator and personally attended the grievance
15 hearing. In November 2004, plaintiff became dissatisfied with
16 Birnberg's legal representation, and in early December 2004,
17 plaintiff filed a complaint with the State Bar of California
18 against Birnberg for professional misconduct.⁴ Subsequently,
19 plaintiff retained Phil Weltin ("Weltin"), an attorney
20 plaintiff believed to be an expert in third party negligence
21 actions.

22 Plaintiff testified that he mistakenly believed that both
23 Birnberg (while he was acting as plaintiff's attorney) and
24 Weltin had been pursuing a civil third party action against

25 ³ The nature of the malfunction is unknown.

26 ⁴ The complaint against Birnberg was closed in April
27 2005 after the State Bar determined that there was insufficient
28 evidence to establish that professional misconduct was
committed.

1 defendant on his behalf.⁵ (Decl. of Andrew J. Sommer Exh. A,
2 Walker Dep., 111:3-21, 112:10-23.) Once plaintiff realized
3 that his third-party action was not being pursued, he
4 attempted to find another attorney to represent him. (Id. at
5 112:15-23.) Failing to find an attorney, plaintiff filed this
6 complaint *pro se* on June 13, 2007.

7 Plaintiff's negligence claim against defendant is
8 governed by the uniform three-year statute of limitations,
9 which applies to suits for recovery of damages for personal
10 injury or death, arising out of a maritime tort. 46 U.S.C. §
11 30106; Usher v. M/V Ocean Wave, 27 F.3d 370 (9th Cir. 1994).
12 As set forth in my earlier ruling (Doc. No. 45), the Supreme
13 Court has held that there is a rebuttable presumption that all
14 federal statutes of limitations contain an implied equitable
15 tolling provision. Irwin v. Dep't of Veterans Affairs, 498
16 U.S. 89, 96-97 (1990); *see also* Walck v. Discavage, 741
17 F.Supp. 88, 90 (E.D. Pa. 1990) (stating it is a "general
18 principle" that equitable tolling is "'read into every federal
19 statute of limitation.'" (quoting Holmberg v. Armbrrecht, 327
20 U.S. 392, 397 (1946))).

21 Equitable tolling of a limitations period is appropriate
22 in three circumstances: (1) where the plaintiff has actively
23 pursued his judicial remedies by filing a timely but defective
24

25 ⁵ In a letter from Weltin to plaintiff dated December
26 28, 2006, Weltin informed plaintiff that he did not believe
27 that plaintiff had a third-party claim. The letter suggests
28 that plaintiff and Weltin had previously discussed other
possible legal actions for plaintiff to pursue, but that
plaintiff was not satisfied with the answers that he had
received from Weltin.

1 pleading (Burnett v. New York Cent. R. Co., 380 U.S. 424, 430
2 (1965)); (2) where extraordinary circumstances outside the
3 plaintiff's control made it impossible for the plaintiff to
4 timely assert his claim (Stoll v. Runyon, 165 F.3d 1238, 1242
5 (9th Cir. 1999); or (3) where the plaintiff, by exercising
6 reasonable diligence, could not have discovered essential
7 information bearing on his claim (Cada v. Baxter Healthcare
8 Corp., 920 F.2d 446, 452 (7th Cir. 1990)); see also Logwood v.
9 Apollo Marine Specialists, Inc., 772 F.Supp. 925, 927 (E.D.
10 La. 1999) ("[e]quitable tolling applies principally when the
11 plaintiff was actively misled about the cause of action by the
12 defendant, was prevented in some extraordinary way from
13 asserting his or her rights, or filed the same claim in the
14 wrong forum.)).

15 Mental incapacity and the effect it has upon the ability
16 to file a lawsuit can be an "extraordinary circumstance" that
17 supports the application of the doctrine of equitable tolling.
18 Robles v. Leppke, No. 06-0219, 2007 WL 2462058 * 1 (E.D. Cal.
19 Aug. 28, 2007); see also United States v. Brockamp, 519 U.S.
20 347, 348 (1997) ("[mental disability], we assume, would permit
21 a court to toll the statutory limitations period"); Laws v.
22 Lamarque, 351 F.3d 919 (9th Cir. 2003) (mental incompetence
23 may warrant equitable tolling for the period the prisoner was
24 incompetent if he can show that the incompetency in fact
25 caused the filing delay).

26 In the Ninth Circuit, "[e]quitable tolling is unavailable
27 in most cases. . . .", Miles v. Prunty, 187 F.3d 1104, 1107
28 (9th Cir. 1999) (citing Calderon v. United States Dist. Court

(Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds by* Calderon v. United States Dist. Court, (Kelly), 163 F.3d 530 (9th Cir. 1998)), and has been found appropriate "when extraordinary circumstances beyond the plaintiff's control [make] it impossible to file a claim on time." Stoll, 165 F.3d at 1242 (citing Alvarez-Machain v. United States, 107 F.3d 696, 700 (9th Cir. 1996))⁶; see also Irwin, 498 U.S. at 95-96 ("Federal courts have typically extended equitable relief only sparingly.") (footnotes omitted).

Even taking the evidence offered in a light most favorable to plaintiff, there is insufficient evidence that would create a genuine issue of material fact of "extraordinary circumstances" that made it "impossible" for plaintiff to file within the statutory period.⁷

⁶ The limited application of the doctrine of equitable tolling in the Ninth Circuit is consistent with other circuit courts. See, e.g., Biester v. Midwest Health Serv., Inc., 77 F.3d 1264, 1268 (10th Cir. 1996) (declining to toll 90 day EEOC filing period for mental incapacity due to "major depression" where no "exceptional circumstances" were alleged and "the evidence demonstrate[d] that, in spite of his mental condition, [plaintiff] 'was capable of pursuing his own claim,' " inasmuch as he "wrote to the EEOC . . . to request a right to sue notice"); Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996) ("Mental illness tolls a statute of limitations only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them. . . . Most mental illnesses today are treatable by drugs that restore the patient to at least a reasonable approximation of normal mentation and behavior.") (emphasis in original).

⁷ Plaintiff does not present any of the other situations set forth in Irwin that would permit equitable tolling of the applicable statute in this case: he neither filed a timely though defective pleading within the applicable statutory period, nor is there any evidence that he was he tricked by defendant into allowing the deadline to pass.

1 There is scant evidence that during the period from May
2 1, 2002, the date of plaintiff's injury, to May 1, 2005, the
3 last day within the applicable statutory period, plaintiff
4 could not have filed a timely complaint against defendant or
5 that plaintiff was mentally (or physically) incapable of
6 filing a complaint against defendant.⁸ If anything, the
7 opposite is true. The record demonstrates that during the
8 three year period at issue, plaintiff was fully capable of
9 managing his legal affairs: after plaintiff was injured, he
10 obtained legal counsel to pursue his worker's compensation
11 claim; he pursued a union grievance and attended the grievance
12 hearing; he filed a complaint with the State Bar against
13 Birnberg; and he obtained new counsel upon becoming
14 dissatisfied with Birnberg's legal representation, counsel
15 whom he believed would handle any third-party lawsuits that he
16 potentially could have brought. Plaintiff also filed a charge
17 of discrimination in 2007 with the EEOC against former

18 ⁸ The record contains letters from various healthcare
19 providers that state that plaintiff has been suffering from
20 chronic brain injuries. These letters, however, do not
21 establish that plaintiff's medical condition prevented him from
22 sufficiently articulating his claims or that plaintiff was too
23 incompetent to tend to either his daily or legal affairs. On
24 September 17, 2008, a psychologist at the Department of
25 Psychiatry at Kaiser Hospital in Vallejo, California, who had
26 been treating plaintiff for several years, wrote a letter to
27 the Court in support of plaintiff's motion for appointment of
28 counsel stating that plaintiff suffered from "significant
 chronic head pain, dizziness, and other symptoms" that impact
 his ability to concentrate and his ability "to deal with
 complex matters." Based on these mental and physical issues,
 the psychiatrist concluded that plaintiff was "incapable of
 representing himself." This letter, however, was written well
 after the applicable statutory period had expired and presents
 no explanation for plaintiff's failure to pursue his claim
 within the prescribed limitations period. See Grant v.
 McDonnell Douglas Corp., 163 F.3d 1136, 1137 (9th Cir. 1998).

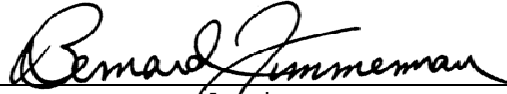
1 defendant Pacific Maritime Association ("PMA") and requested a
2 right to sue letter, and on June 13, 2007, plaintiff,
3 proceeding in *pro se*, filed a Title VII discrimination claim
4 against PMA, MTC, his union, and defendant, which is the
5 origin of the current dispute.

6 Plaintiff has failed to offer any evidence or allege
7 specific facts, and the Court has found none, that would
8 create a "genuine issue of material fact" that his physical
9 and emotional injuries were "exceptional circumstances" that
10 prevented him from proceeding with his claims, especially in
11 light of all of the contrary evidence listed above. Nor do
12 plaintiff's mental and emotional injuries rise to the level of
13 the mental or physical incapacities contemplated by courts
14 that have tolled limitations periods as a result of such
15 incapacities. See, e.g., Stoll, 165 F.3d at 1242 (equitable
16 tolling was proper where "overwhelming evidence" demonstrated
17 that complainant was completely disabled during the
18 limitations period and incapable of communicating with her
19 lawyer); Cf., Langner v. Simpson, 533 N.W.2d 511, 523 (Iowa
20 1995) ("The statute of limitations is not tolled if the person
21 has a mental illness not rising to the level of a disability
22 such as to prevent the person from filing a lawsuit. In short,
23 the disability must be such that the plaintiff is not capable
24 of understanding the plaintiff's rights."); Lopez v. Citibank,
25 N.A., 808 F.2d 905, 906-07 (1st Cir. 1987). Plaintiff's
26 ability to consult with attorneys and file various other
27 claims, such as with his union and with the State Bar, during
28 his alleged period of legal incompetency undermines his claims

1 of legal incompetency.

2 I find no need for argument and vacate the hearing
3 scheduled for April 29, 2009. It is **ORDERED** that defendant's
4 motion for summary judgment is **GRANTED**.

5 Dated: April 20, 2009

6 

7 Bernard Zimmerman
United States Magistrate Judge

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